

No. 12,393

IN THE
United States Court of Appeals
For the Ninth Circuit

COLUMBIA LUMBER COMPANY, INC. (a
corporation),

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA,
co-partners doing business under the
firm name and style of Barry Arm
Camp,

Appellees.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

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Upon Appeal from the District Court for the
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BRIEF FOR APPELLANT.

VERDICT BELOW.

A verdict was entered in the court below in favor of appellees and against appellant, in the sum of \$14,-092.00 (Tr. 97-98). It is from the judgment based on that verdict that this appeal has been taken.

JURISDICTION.

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, Sec. 4, 31 Stat. 322 as Amended, 48 U.S.C.A., Sec. 101. The jurisdiction of this court rests on Section 1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED.

1. Was there evidence to support the verdict of the jury, or was the verdict manifestly against the evidence or the result of passion, prejudice, sympathy or mistake?

2. Did the trial court err in giving Instruction No. 5 over appellant's objection, since that instruction permitted the jury to conclude that landing a scow in the unoccupied portion of a tidewater pond in which appellees had placed a few pilings, constituted a taking of possession of appellees' property by appellant so as to complete a sale?

3. Did the District Court err by refusing to instruct the jury that Kenneth Lambert was an independent contractor at all times after April 1, 1948 since all the oral evidence and the written contract executed between the appellant and Lambert could only be construed as establishing an independent contract relationship?

4. Was the alleged oral contract of sale of March 24, 1948, unenforceable as falling within the provisions of the Statute of Frauds, A.C.L.A. 1949, Section 29-1-

12, since there was no such acceptance or receipt as to take the contract out of the statute; and did the court err in giving Instruction 4 which stated "An oral contract for the sale of personal property may at law if proved be just as valid and enforceable as though it were written"?

5. Did the court err in permitting evidence to be introduced of an alleged prior inconsistent oral agreement, since an agreement of sale was entered into between the parties on June 29, 1948, reduced to writing, signed by appellees, and acted upon by appellant?

6. Did the court err in permitting testimony over appellant's objection as to the contents of an alleged telegram purporting to grant appellees a continuation of their timber permit?

7. Did the court err in allowing appellees further to amend their amended complaint after appellees had rested, in view of the fact that the second amended complaint was based upon a substantially changed cause of action?

8. Did the court err in denying appellant's motions to strike portions of appellees' second amended complaint and make more definite and certain, and to strike portions of appellees' reply, since improper allegations highly prejudicial to appellant were permitted to go to the jury by virtue of the court's order denying these motions?

SPECIFICATION OF ERRORS.

The Specification of Errors (Tr. 660), may be summarized as follows:

1. There was no evidence to support the verdict of the jury, which verdict was manifestly against the evidence and was the result of passion, prejudice, sympathy or mistake.

2. The honorable trial court erred in giving Instruction No. 5 over appellant's objection, since that instruction permitted the jury to conclude that landing a scow in the unoccupied portion of a tidewater pond in which appellees had placed a few pilings, constituted a taking of possession of appellees' property by appellant so as to complete a sale.

3. The District Court erred by refusing to instruct the jury that Kenneth Lambert was an independent contractor at all times after April 1, 1948 since all the oral evidence and the written contract executed between the appellant and Lambert could only be construed as establishing an independent contract relationship.

4. The alleged oral contract of sale of March 24, 1948, was not enforceable because it fell within the provisions of the Statute of Frauds, A.C.L.A. 1949, Section 29-2-12, since there was no such acceptance or receipt as to take the contract out of the statute; and the court's Instruction No. 4 was erroneous in stating under the circumstances of this case that "An oral contract for the sale of personal property may in law if proved be just as valid and enforceable as though it were written".

5. On or about June 29, 1948, the parties hereto entered into an agreement for the sale of the property in question. Since this agreement was reduced to writing, signed by appellees, and since appellant took possession of the property under the terms of this agreement, the court erred in permitting evidence to be introduced of an alleged prior inconsistent oral agreement involving the same transaction.

6. The court erred in permitting testimony over appellant's objection as to the contents of an alleged telegram purporting to grant appellees a continuation of their timber permit.

7. The court erred in allowing appellees further to amend their amended complaint after appellees had rested, since the second amended complaint was on a substantially changed cause of action.

8. The court erred in denying appellant's motions to strike portions of appellees' second amended complaint and make more definite and certain, and to strike portions of appellees' reply, since improper allegations highly prejudicial to appellant were permitted to go to the jury by virtue of the court's denying these motions.

STATEMENT.

In March of 1948, Bruno Agostino, one of the appellees, was staying at a logging camp located at Barry Arm of Prince William Sound to the west of a stream known as Mosquito Creek in the Chugach National Forest, title to which was in the United States

of America under supervision of the Department of Agriculture Forest Service. Appellees had had two timber cutting permits granted to them by the United States Forest Service, each authorizing the cutting of 500,000 board feet in the vicinity of Barry Arm. Logging under the first was completed; and the second permit had expired as of December 31, 1947, although all of the authorized timber had not been felled.

The United States Forest Service had advertised a much larger timber contract for sale, covering timber on the east side of Mosquito Creek as well as timber on the west side of the creek beyond the area covered in appellees' permits. The appellant was successful in bidding on this contract and was awarded the right to cut timber in this area.

Appellant entered into a written contract (Tr. 249-252) with Kenneth Lambert to cut timber under appellant's permit. Lambert was to hire his own men and to be in complete control of the operation, paying all expenses thereof, and was to be paid \$21.00 per thousand board feet of logs rafted. During the month of March, 1948, Lambert was paid a salary by appellant while he was engaged in setting up the logging camp. After March 31st he worked in accordance with the provisions of the above mentioned contract.

During the latter part of March, Lambert approached the mouth of Mosquito Creek from a tidal inlet with the purpose of landing a floating lumber camp in a natural tidal pond at the outlet of the creek and starting operations under his contract. The appellee, Agostino, however, appeared and objected to

Lambert's grounding his camp vessels on the shore of the pond. Agostino claimed to own the pond and shorelands. After some discussion, Agostino offered to sell his camp to the appellant, mentioning a price of \$25,000.00. Lambert and Rowell, the latter being superintendent of appellant's lumber mill located at Whittier, Alaska, also on Prince William Sound, then telephoned Thomas A. Morgan, the president of the appellant corporation, by long distance. Mr. Morgan told them to go ahead with their operations and to explain to Mr. Agostino that they had the right to go into that area under their contract with the United States Forest Service. Mr. Agostino still objected to Lambert's bringing in the camp, and again Mr. Morgan was telephoned by Lambert and Rowell. Morgan told them he would be at Barry Arm around April 10th and that he would see Mr. Agostino at that time. There also was testimony to the effect that a telegram was sent to Lambert and Rowell by Mr. Morgan. The telegram was not introduced into evidence but the testimony was to the effect that the message stated that Mr. Morgan would be at Barry Arm on about April 10th to discuss the matter with Mr. Agostino, or according to other testimony, "to settle with Mr. Agostino" (Tr. 225, 254, 371, 528).

Upon being shown this message Mr. Agostino told Lambert he could take "possession". Lambert proceeded to land the floating camp to the east of Mosquito Creek in the tideland pond. After a few days the camp was moved up Mosquito Creek and shortly thereafter logging operations were commenced.

On the basis of these facts, appellees claimed in their amended complaint that on or about March 24, 1948, an oral agreement had been entered into between appellees and appellant whereby appellant purchased appellees' camp and equipment at Barry Arm for the price of \$25,000.00.

On or about April 10, 1948, Mr. Morgan came to Barry Arm and had a conversation with Mr. Agostino in the presence of Mr. Lambert and Mr. Rowell. Mr. Agostino at that time offered to sell the property for either the price of \$25,000.00 or \$19,000.00, the testimony being in dispute on that point. Mr. Morgan stated that the appellant company would not be interested at that price, and offered to lease appellees' property and equipment, but this was not acceptable to Mr. Agostino. All witnesses concurred in stating that no agreement was reached at that time. During the negotiations Mr. Lambert, at the request of Mr. Morgan, made in the presence of Mr. Agostino, attempted to start appellees' two tractors in order to appraise their value.

Mr. Agostino testified that Mr. Morgan stated he would return in two days, but the testimony of all other witnesses to the conversation including appellees' witness Lambert, indicate that no such statement was made. Mr. Agostino stayed at the property for about three weeks and then went to Anchorage. About the end of May, he returned to Barry Arm with his attorney, Mr. Butcher, in order to investigate the possibility of a trespass action against the appellant (Tr. 455). They found all of appellees' equipment remained

in the same place and condition as it had been prior to Lambert's coming and that none of appellant's or Lambert's employees were using any of appellees' property.

Thereafter, at Mr. Butcher's request, Mr. Morgan came to Anchorage in June to discuss a possible sale of the property with Mr. Agostino. After some discussion an agreement was entered into whereby the appellant agreed to purchase all of appellees' property at Barry Arm for the sum of \$10,000.00 (Tr. 462). Mr. Butcher, appellees' attorney, reduced the contract to writing. The contract, which expressly stated that it embodied all agreements between the parties, was signed by Mr. Agostino and sent by letter dated July 2, to Mr. Morgan, who was then in Juneau. The written contract did not contain a list of the property to be conveyed, and Mr. Morgan returned to Anchorage to settle this minor detail, only to find that Mr. Butcher was out of town.

He thereupon wrote checks to take care of the various payments under the contract, left them with his agent in Anchorage, and on July 19, wrote Mr. Butcher a letter stating that the agreement was acceptable provided that a list of the property and equipment was furnished.

About this same time Mr. Lambert's contract was terminated. The appellant took over the operation at Barry Arm, and Mr. Morgan sent instructions that the appellees' property had been purchased and that the two tractors should be repaired so that they could be

used in the logging operation. It was after these instructions that, for the first time, the tractors were taken by appellant's employees and that one of appellant's employees and his wife stayed at appellees' bunk house. Prior to that time Mr. Morgan had given instructions that appellees' property was not to be touched (Tr. 533, 598).

Mr. Agostino conferred with his attorney, Mr. Butcher, upon the latter's return in August. At that time he refused to furnish a list of the property as requested by appellant, insisted on retaining one small log cabin as his own and then revoked the contract (Tr. 196).

About the end of August, Mr. Morgan, through his attorney Mr. McCarrey, was informed that Mr. Agostino had revoked the contract, whereupon Mr. Morgan ordered the appellees' equipment to be returned, and appellant's employees to leave appellees' property alone. Appellees' equipment was returned, but subsequently the Ellamar Packing Company took one of the tractors, claiming it under a conditional sales contract, and one Ray Grasser, a former partner of appellees, apparently took the other tractor and a donkey engine. Suits are now pending in the District Court at Anchorage between appellees and Mr. Grasser, and between appellees and the Ellamar Packing Company, Inc. (Tr. 481, 485).

At the conclusion of appellees' direct case, appellant moved for a directed verdict and for a nonsuit. The honorable court conceded that the allegations of

the amended complaint had not been maintained, but authorized the appellees further to amend their complaint so as to state a cause of action based on a *quantum valebant* theory. The complaint was thereafter amended to allege that on or about March 24, 1948, the appellees sold to the appellant all of their property at Barry Arm and that appellant took possession of all of the property and became indebted to pay the reasonable value therefor. Over appellant's objection, the trial was continued on this new theory, resulting in the verdict from which this appeal has been taken.

ARGUMENT.

I.

THERE WAS NO EVIDENCE TO SUPPORT THE VERDICT OF THE JURY, WHICH VERDICT WAS MANIFESTLY AGAINST THE EVIDENCE AND WAS THE RESULT OF PASSION, PREJUDICE, SYMPATHY OR MISTAKE.

In order for the appellees to prove their case it was necessary that they prove a sale of their Barry Arm camp and equipment to, and a taking possession thereof by, the appellant on or about March 24, 1948. An effort has been made in this brief to state the facts in some detail in order to indicate the exact nature of the evidence relied upon. These facts indicate that towards the end of March, 1948, the appellee, Bruno Agostino, offered to sell his buildings and equipment at Barry Arm to the appellant. This offer was made to Mr. Rowell, an employee of the appellant, and to Mr. Lambert, an independent con-

tractor who was, during the month of March only, an employee of appellant engaged in setting up a logging camp from which he was to work as independent contractor. Neither of these men had authority to make any substantial purchase on behalf of the appellant and their only authority in regard to making such a purchase as the one in question was to deliver messages to and from the president of the appellant company.

It appears that Mr. Agostino's offer was conveyed to Mr. Morgan, the president of appellant company. All the evidence of the case is clear, however, that Mr. Morgan never accepted the offer. He sent word that he would come to see Mr. Agostino, and according to one of appellees' witnesses, to arrange a settlement with him (Tr. 225). Upon receipt of this message, Mr. Agostino told Mr. Lambert that he could take "possession".

By no stretch of the imagination could Mr. Morgan's message that he would come up to see Mr. Agostino, or as the appellee Agostino stated, that he would come on the 10th of April and settle with Mr. Agostino (Tr. 132), constitute an acceptance of that offer. The only possible interpretation of such a message is that Mr. Morgan expressed an intention to discuss the matter with Mr. Agostino, and to attempt a settlement of the difficulty which had arisen between appellant and Mr. Lambert.

Since there was no expressed acceptance of a contract, it next is necessary to see whether an acceptance by the appellant may be spelled out by the authorized

actions of its agents. When Mr. Agostino received Mr. Morgan's message he told Mr. Lambert to take "possession". Lambert, whose contract with the appellant had been terminated in the middle of the 1948 logging season (Tr. 229) appeared as a witness for the appellees. It is significant that neither he nor Mr. Rowell testified that he had been authorized by Mr. Morgan to effect the purchase of the property in question, nor does Mr. Agostino in his testimony state that he was ever so informed. Thus, although no action was taken by Mr. Lambert which might be implied as an acceptance of the offer of purchase, even if there had been such action taken it would not be binding on the appellant as it would not be within either the actual or apparent scope of authority of Mr. Lambert. There was nothing in his position either impliedly or otherwise which would indicate authority to purchase anything, much less such a sizeable amount of property, for the appellant.

As stated by the honorable court below:

"In fact, it is apparent now as a matter of law from the testimony that Lambert had only such authority as he received by telephone or telegraph from the office of the Columbia Lumber Company at Juneau in his capacity, whatever it was, working for the Columbia Lumber Company. It is clear that he had no authority to buy property—any property—and certainly no property for a very considerable sum of money." (Tr. 574, 575.)

All the testimony indicates that Lambert had no authority to purchase appellees' property or to take

possession of any of it on behalf of appellant. In fact, he was expressly instructed not to touch any of appellees' property.

Testimony of Thomas A. Morgan (Tr. 375):

"Q. Did you at that time or any time prior to that authorize any of your employees or Mr. Lambert to use any of Mr. Agostino's property or equipment?

A. As a matter of fact to the contrary I told him I would have nothing to do with it."

Mr. Rowell testified (Tr. 533):

"Q. What did Mr. Lambert—did Mr. Morgan give Mr. Lambert any instructions with regard to Mr. Agostino's property?

A. I heard him tell him not to touch anything.

* * * * *

Q. What was your answer to that question?

A. I heard him tell him not to use any of the equipment, not to touch any.

Q. Of Mr. Agostino's?

A. That is right."

The remaining witness to testify on this point was the appellees' witness, Lambert (Tr. 598):

"Q. Now did Tom Morgan or anyone in power at Columbia Lumber Company ever tell you that you could use Bruno's equipment there?

A. No——

Q. Did they ever tell you—pardon me.

A. I will have to retract. Mr. Morgan told me I could use that equipment. That was at the time I terminated with the Columbia Lumber Company.

Q. But prior to that time had he ever told you that?

A. No.

Q. In fact he told you just the opposite?

A. That is right."

It is to be noted that Mr. Lambert's contract was terminated on or about July 14, 1948 (Tr. 229), after a written contract had been entered into for the sale of this property for \$10,000. This written contract was subsequently revoked by Mr. Agostino, and appellees did not sue on this contract. Thus, as far as the time in question was concerned, it was apparent that no one on behalf of the appellant had actual or apparent authority to take possession of appellees' property on behalf of the appellant.

Moreover, no action was taken by anyone on behalf of the appellant which could be interpreted as an implied acceptance of Mr. Agostino's offer to sell.

All that was done by Mr. Lambert was to land a floating camp in a tidewater pond. On direct examination for appellees, he testified as follows:

"Q. What equipment did you take over from Mr. Agostino and Mr. Socha?

A. I didn't take over any.

Q. Well you came on the ground and landed your equipment.

A. Yes." (Tr. 231),

and

"Q. What happened to the warehouse and other things there following your landing?

A. I never used any of that as long as I was there." (Tr. 232.)

Even the appellee, Agostino, on direct examination testified in regard to the landing of the scow by Lambert and the succeeding events as follows:

“Q. Were they using your machinery and equipment during that time?

A. No, they never used the machinery, Mr. Lambert, no.

Q. He just started it up to try it out?

A. Yes.

Q. Now, then, did they land their house and things there then?

A. I don't understand.

Q. Did they land their scows there then?

A. Yes.

Q. What did they do during that month?

A. Well, they fixed the machinery, that was all the work, waiting for the snow to go out.

Q. Fixed the machinery and waited for the snow to go out?

A. Yes.

Q. When did they actually start cutting logs?

A. Well, now, I couldn't tell you that day because after they got the machinery fixed they move in back of the pond and I came in to Anchorage. I don't know when they started to cut the timber.

Q. Did they start using your bunkhouse and cookhouse?

A. No, they never use my cookhouse and bunkhouse.

Q. Not at that time?

A. Not at that time.” (Tr. 169, 170.)

Under cross-examination, Mr. Agostino admitted that the machinery which was “fixed” at that time was

Columbia Lumber's machinery and not the machinery of appellees (Tr. 191).

That Agostino, himself, did not believe that any sale had taken place, is made even clearer by the testimony of his former attorney, Mr. Butcher, who was consulted by Mr. Agostino in May. Mr. Agostino went to Mr. Butcher because "he felt that the company was trespassing on his property" (Tr. 455). He would not have taken that attitude had he thought an actual sale had transpired in March, 1948, since it would no longer have been "his property".

Moreover, in June, almost three months after the sale had allegedly occurred, an agreement of sale was entered into between Mr. Morgan and Mr. Agostino in Mr. Butcher's office. This agreement was reduced to writing by Mr. Agostino's attorney, Mr. Butcher. It expressly stated:

"It is hereby specifically agreed that all the terms and conditions in connection with this contract have been set forth herein and that there are no other agreements, verbal or written, pertaining to this sale or the method of paying for the same on the part of purchaser."

Mr. Agostino signed this agreement and acknowledged it before a Notary Public. Regardless of whether or not this written agreement together with the letter sent in reply thereto by Mr. Morgan and appellant's actions after receiving it, constituted a binding contract, it clearly negates appellees' contention that in March a sale had taken place conveying the same property.

It is also highly significant that when Mr. Agostino and Mr. Butcher came to Barry Arm at the end of May or early in June to inspect the appellees' property, they found none of it being used or possessed by the appellant (Tr. 193, 194).

What actually transpired was stated in the concluding testimony by the appellees' witness Lambert, under cross-examination, as follows (Tr. 599):

“By Mr. Boochever. Q. Now, you spoke about a conversation of April 10th in which some mention was made of a small cabin, Mr. Lambert?

A. Yes.

Q. Was any agreement reached in regard to the sale of that property at that time?

A. No.

Mr. Boochever. That is all, Your Honor.

Further Redirect Examination

By Mr. Ross. Q. Now, that property, Mr. Lambert, when you state that do you mean just that cabin or do you mean the agreement about the whole Barry Arm campsite? (552).

A. The whole Barry Arm campsite including all material that was there, all equipment.

Further Recross-examination

By Mr. Boochever. Q. Was any sale made at that time of the Barry Arm camp?

A. No.

Q. Was any made prior to the date when you were there?

A. Not to my knowledge.

Mr. Boochever. That is all, Your Honor.

The Court. That is all, Mr. Lambert, you may step down."

It thus is apparent that not only was there no express contract for the sale of the appellees' property, but that all the testimony is to the effect that there was no implied contract. The verdict of the jury accordingly should be set aside as not supported by any legal or competent evidence and as being against the evidence. The deductions drawn from the evidence by the jury were clearly erroneous and such as a jury reasonably viewing the evidence could not properly find, and the verdict was against the law as applied to the facts found and against the admissions of appellee Agostino and appellees' witness Lambert. As a result of such verdict, substantial justice has not been done; and the verdict, having been based on passion, prejudice or mistake, should be set aside.

Work v. Kinney, 7 Idaho 460, 63 P. 596;

Calnon v. Fidelity Phenix Fire Ins. Co., 114 Neb. 53, 205 N.W. 942, modified on other grounds, 207 N.W. 528;

Phillips v. Yarter, 156 N.Y.S. 875, 172 App. Div. 912;

National Life & Accident Ins. Co. v. Langston (Civ. App.), 42 S.W. (2d) 1037;

O'Brien v. Alston, 213 P. 791, 61 Utah 368;

Crescent Mfg. Co. v. Hansen, 174 Wash. 193, 24 P. (2d) 604;

Magnolia Petroleum Co. v. Bell, 186 Ark. 723, 55 S.W. (2d) 782;

- Ennis v. Milwaukee Electric Ry. & Light Co.*,
202 Wis. 277, 232 N.W. 540;
Platt v. Owens, 183 Ark. 261, 35 S.W. (2d) 358;
Randleman v. Bocres, 93 Cal. App. 745, 270 P.
374;
Kawczynski v. Prudential Ins. Co. of America,
279 N.Y.S. 270, 244 App. Div. 759;
Verdi v. Helper State Bank, 57 Utah 502, 196
P. 225, 15 A.L.R. 641;
Turner v. Good, 8 P. (2d) 414, 167 Wash. 27;
Mason v. Town Garage Co., 53 S.W. (2d) 409,
227 Mo. App. 297.

II.

THE HONORABLE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 5 OVER APPELLANT'S OBJECTION, SINCE THAT INSTRUCTION PERMITTED THE JURY TO CONCLUDE THAT LANDING A SCOW IN THE UNOCCUPIED PORTION OF A TIDEWATER POND IN WHICH APPELLEES HAD PLACED A FEW PILINGS, CONSTITUTED A TAKING OF POSSESSION OF APPELLEES' PROPERTY BY APPELLANT SO AS TO COMPLETE A SALE.

An essential matter of proof in appellees' case was the necessity of showing that the appellant took possession of appellees' property on or about March 24, 1948. It was undisputed that appellant landed a scow containing bunkhouses and logging equipment in a certain tidewater inlet near the mouth of Mosquito Creek. This so-called pond was, according to the appellee Agostino's testimony, approximately 400 feet wide and 20 feet deep when the tide was in (Tr. 123).

The evidence was that this tidewater pond was a natural one (see Tr. 162).

There was also evidence that appellees had placed some hand driven piles in a portion of this pond (Tr. 162). The testimony was conflicting as to the number of such pilings placed in the pond and the area covered by them (Tr. 162, 348, 154), but there was no testimony to the effect that appellant ever used any of these pilings or in any way interfered with them. Pictures showing the pilings and the general pond area were introduced into evidence by appellees (see plaintiff's Exhibits 4, 10, 12, 16, 17, 19 and 24).

There was also conflicting testimony by the appellees Agostino and Socha, as to whether any other work had been done in regard to this pond, the witness Agostino stating that no work was done on the pond other than putting in approximately 30 pilings (Tr. 162), while the witness Socha stated that a portion of the pond was cleared of stumps. In any event, there was no evidence to the effect that the appellant or Mr. Lambert landed the scow or used the portion of the tidewater pond so cleared. The only testimony on this point was by the witness E. M. Jacobson, who stated that the appellant did not use the portion of the tidewater pond previously used by Agostino and Socha (Tr. 290).

In view of the conflicting testimony in regard to the nature of this pond, and in view of the importance of the question as to whether or not the landing of a scow on an unoccupied portion of the shore of this pond would constitute a taking of possession of ap-

pellees' property, the court's instruction on this point was of paramount significance to the outcome of this case. Instruction No. 5 stated in part:

“It should be noted that as respects tidelands, actual possession is necessary to establish superior right. Without actual possession all persons enjoy equal right to use thereof. *Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings. But exclusive uninterrupted and long continued possession and use for other purposes may give such superior right, provided there is real and actual possession.*” (Emphasis ours.)

Appellant excepted to this instruction, pointing out the instruction as given could be construed in such a manner that a few pilings in a tideland pond would give the appellees the exclusive right to the whole pond so that appellant's taking the possession of an unoccupied portion of the pond, could be interpreted by the jury to constitute an acceptance of possession of appellees' property.

Instruction No. 5 as originally given by the court provided that:

“Plaintiffs had the lawful right to keep and maintain possession of the lands and tidelands possessed by them on and prior to March 24, 1948.”

Exception was taken to this instruction for the reason that no definition was given as to what constituted possession (see Tr. 637, 638). As a result of this exception, after arguments had been made to the jury, the court added an additional paragraph to Instruc-

tion No. 5, which contained in part the provisions quoted above. Exception was duly taken to this portion of the instruction, as follows:

“Counsel for defendant may take exceptions.

Mr. Boochever. The only one is in regard to Instruction 5 on page 2 where it states ‘Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings.’ We think that after that there should be added ‘and that the superior right established by such position (possession) extends only to such structural improvements and not to unoccupied portions of tidelands’ or some such similar provision so that they will understand that a few pilings in a tideland pond does not give exclusive right to the whole pond but only to the portions occupied by the pilings.” (Tr. 652.)

Although it would have required but a simple change to have clarified this instruction, the court did not see fit so to do and the obviously erroneous impression was left with the jury, by which they could construe the landing of a scow in an unoccupied portion of a sizeable tidewater pond as constituting a taking of possession of appellees’ property.

The courts have long adjudicated the type of possession which is necessary to constitute a superior right to tidelands of other public lands of the United States. The paramount title to tidelands in Alaska is in the United States and the only question involved is that of possessory rights.

The case of *Juneau Ferry & Navigation Company v. Alaska Steamship Company*, 1 Alaska 533 Affirmed

121 Fed. 356, 2 Alaska Fed. 59, is somewhat similar to the one at bar. In that case the plaintiff sought to restrain the defendant from building a wharf across a portion of tidelands claimed by the plaintiff. As stated by the District Court in 1 Alaska at page 535:

“The plaintiff claims title by occupation of a certain portion of this tidewater, having, as it says, kept a ‘cradle’ anchored on a part of the same, by itself and its grantors since 1899 * * * It is a matter of grave doubt whether a person can put a pile or two upon the tide flats, or any such temporary structure as the ‘cradle’ described by the witnesses in this case and thereby establish possession or right of possession. It is to be remembered that these tidelands are not held for sale by the government; that no one can occupy them as of right, as they can uplands, with a view of obtaining title thereto from the government when the land shall come into the market. All that go upon these tidelands are trespassers. They are there without right or authority of law. If they have possession, it must be such character of possession as keeps all others out and such as constitutes actual occupation by themselves.”

This honorable court affirmed the decision of the District Court, stating:

“The suit being one in equity, we must decide it upon the evidence; and we are of the opinion that while the evidence undoubtedly shows that the complainant and its predecessors in interest used the strip of waterfront in controversy from time to time, yet it falls far short of establishing such possession thereof on the part of the

complainant as would justify the injunction prayed for.”

Similarly, in the case of *Haines Wharf Company v. Dalton*, 1 Alaska 555, the District Court for the Territory of Alaska stated:

“* * * The occupation by the Daltons of other portions of the tract having no boundaries fixed therefor, would give them no right of possession whatsoever over lands wholly unoccupied. Legally speaking as he had no boundaries to his southern line bordering on the street at the water line * * * he had no possession or right of possession of any of the lands south of the ground actually occupied by him, viz., by the Dalton building.”

This honorable court gave its interpretation of the terms “occupancy” and “possession” in the case of *Gordon v. Ross-Higgins Co.*, 162 Fed. 637, by quoting from the case of *Fleming v. Maddox*, 30 Iowa 240, as to the meaning of “occupancy” as follows:

“It follows from these authorities that there can be no such thing as constructive occupancy under the townsite laws, but there must be an actual bodily presence of the claimant, or some one for him on the lot or lots for which he seeks to acquire title, or a purpose to enjoy united with or manifested by such visible acts, improvements, or inclosures as will give to the claimant the absolute and exclusive enjoyment of it.”

and, as to the meaning of the term “possession”, by quoting from the case of *Courtney v. Turner*, 12 Nev. 345 at 352, as follows:

“ ‘Actual Possession’ of land consists of subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use. Justice to the community also requires in the circumstances of this country that the extent of the claim should be clearly defined and that the possession should be open, notorious and continuous.”

The case of *Crawford v. Burr*, 2 Alaska 33, involved analogous circumstances. The plaintiff had erected a stable on a subsequently abandoned military reservation and claimed the surrounding land. He brought a suit for ejectment, but the District Court held, on pages 37 and 38:

“Whatever fencing Crawford may have had in 1900, there is no claim or pretense that he had any such, or any other boundary around the tract on July 25, 1902. Upon that date his small log stable, overgrown with brush, yet stood where he erected it in 1900, and constituted his only sign of possession. He then made no attempt to locate his boundaries definitely by stakes, monuments, fences or otherwise, and the defendants located on that tract without any knowledge of the extent of his claim other than as shown by the stable. Under this condition of the evidence, the land being unsurveyed, he must be limited to the land actually occupied by the stable.” See also *Hinchman v. Ripinsky*, 3 Alaska 557; *State v. Central P. Railway Co.* (Sup. Ct. of Nev.), 30 P. 686 at 688; *Price v. Brockway*, 1 Alaska 235.

In the case at bar, the instruction of the honorable court stating that actual possession is manifested by

pilings, without explaining that a few pilings in a large pond would not, in and of itself, give a superior right to the unoccupied portions of the pond, in effect amounted to instructing the jury to find that appellant had taken possession of appellees' property by landing a scow in the unoccupied portions of this pond. This instruction, under the circumstances of this case, was clearly erroneous and may well have been the reason that the jury reached its incorrect verdict in this case.

Moreover, Instruction 5 in regard to the possession of public lands, made no reference to the paramount title of the United States and to those claiming a right under the United States. The instruction was specifically excepted to for that reason (see Tr. 638 and 639).

There had been testimony to the effect that appellees' permit to cut timber had expired as of December 31, 1947, and that it had not been reinstated until July of 1948, after the alleged sale had taken place (Tr. 311). There was also testimony to the effect that appellant had, in the month of February or March, secured a contract from the United States Forest Service to log timber in this area (Tr. 281, 282). The jury, in deciding whether appellant was taking possession of appellees' property by landing a scow and going into this area, should have been instructed as to the paramount rights of the United States and those claiming under it. Appellant's requested Instructions Nos. 20 and 26 were given to the court within the time prescribed by the court rules

and appellant took timely exception to the court's instruction as mentioned above. In omitting reference to the rights of those claiming under the United States, it is respectfully submitted that the honorable court erred and that such error was highly prejudicial to the appellant.

III.

THE DISTRICT COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT KENNETH LAMBERT WAS AN INDEPENDENT CONTRACTOR AT ALL TIMES AFTER APRIL 1, 1948 SINCE ALL THE ORAL EVIDENCE AND THE WRITTEN CONTRACT EXECUTED BETWEEN THE APPELLANT AND LAMBERT COULD ONLY BE CONSTRUED AS ESTABLISHING AN INDEPENDENT CONTRACT RELATIONSHIP.

Mr. Lambert entered into written contract with the appellant on February 16, 1948, whereby he agreed to produce logs for appellant for a price of \$21.00 per M. (Tr. 249-252, Defendant's Exhibit "D"). He appeared as a witness for the appellees and on cross examination testified as to his functions under this contract as follows:

"Q. (By Mr. Boochever). Now, Mr. Lambert, in conformity with that contract you hired your own men, did you, to go up there and log for you?

A. Yes.

Q. And you were the boss of those men and in charge of them and could fire them and tell them what to do, is that right?

A. Oh, yes.

Q. No one came in and said you do this, that or the other thing with regard to the details of the work?

A. No." (Tr. 252.)

There was testimony to the effect that during the month of March, 1948, Mr. Lambert received wages from the appellant while Lambert was engaged in moving the floating camp and A-frame from Hobo Bay to Barry Arm. The period of time that he received such wages terminated on March 31, 1948. (Tr. 260.) After that time, he was on his "own as a contractor." (Tr. 263.)

Regardless of whether or not Mr. Lambert might have been regarded as an independent contractor during the month of March, when he received wages from the appellant, all the evidence indicates that he was an independent contractor rather than a servant of appellant on and after April 1, 1948.

Edward F. McAllister testified as follows:

"Q. Where were you in the spring of 1948?

A. I came to Barry Arm Camp on the 15th of April.

Q. How did you happen to come there?

A. I hired out to Blacky Lambert of Seattle. (Blacky Lambert was the nickname of Kenneth B. Lambert).

Q. And did Mr. Lambert hire you?

A. That is right." (Tr. 343.)

Thomas A. Morgan, president of appellant company, testified as to the company's method of securing logs, as follows:

“Q. How do you usually operate in regard to getting timber cut?

A. Our policy for many years has been to contract with independent loggers—men to whom we will give a contract to produce a specified quantity of timber each year, anywhere from perhaps a million feet to perhaps 10,000,000 feet.

Q. Do you have any control over the manner in which those men operate with regard to how they handle their employees and the detail of their business?

A. We do not. We give each one a contract which is properly set up to give them full jurisdiction and they are in fact an independent contractor—hire the men, fire them, and provide the usual supervision as an independent contractor.” (Tr. 365, 366.)

Although a number of factors are of importance in determining whether a relationship is that of master and servant or contractee and independent contractor, the principal test is the right to control the mode of doing the work (56 C.J.S. 49). Other considerations are the control over the employee's servants and the mode of payment. In all of these regards, the evidence in the subject case is not conflicting but leads to the inescapable conclusion that Lambert was an independent contractor at all times after April 1, 1948.

Since it was imperative that appellees prove a taking of possession by appellant, the actions of Mr. Lambert while in the vicinity of Barry Arm were of considerable importance. As the acts of an independent

contractor, these actions were not binding on appellant unless expressly or impliedly authorized.

Mr. Lambert, during the period of time after April 1, used some gasoline and oil which he stated that he "borrowed" from appellees (Tr. 595), and cut some timber which appellees claim belonged to them. This was done without any authority from the appellant.

"Q. And the borrowing of those barrels of oil was done on your own, isn't that right?

A. Yes.

Q. Entirely so?

A. Yes." (Tr. 598.)

A requested instruction, Defendant's Requested Instruction No. XIV, (and also Defendant's Requested Instruction No. XXIV), accurately stating the law in regard to the fact that Mr. Lambert was an independent contractor, was filed with the Court in accordance with the Rules of Court. Timely exception was taken to the court's failure to instruct the jury on this important matter, as follows:

"Your Honor, requested instruction of the Defendant No. 14 has to do with independent contractors, and Kenneth Lambert, as previously mentioned we feel that we are entitled as a matter of law to an instruction that Lambert was an independent contractor. We also feel that we are entitled to an instruction of the court that Lambert's employment was such prior to the time that he started as an independent contractor that he wasn't entitled to bind the defendant on any sale or attempted sale or purchase or anything of that nature. We feel that the evidence is un-

disputed in that respect and that it is improper to let that matter go to the jury without an instruction on it." (Tr. 643, 644.)

Instead of giving appellant's requested instruction, the Honorable Court erroneously left it up to the jury to decide whether or not Mr. Lambert was an independent contractor from and after April 2, 1948. (See Instruction 6-D, Tr. 88 and 89.)

After objection by appellant, the court did add a definition of an independent contractor. The instruction, as given, however, was objected to by counsel for appellant, pointing out that under the circumstances of this case, Mr. Lambert's status as an independent contractor involved a question of law and was not a proper one for the jury (Tr. 632). The written evidence, as well as all the oral testimony, indicated that Lambert was in complete control of the details of the logging operation, that he hired and fired his own men, that he was under no control by appellant except as to the end results of the performance of his contract. There was no testimony in conflict with this evidence, and manifestly the court should have instructed the jury as to Mr. Lambert's status, rather than leaving it as a matter for conjecture.

The law is well settled that:

"The existence of such relation ordinarily is a question of law for the court where its determination depends on a written contract which is definite and unambiguous in its terms, and such is the case where the facts are clear and undisputed, although the contract rests in parol.

* * * Where the contract of employment is in writing and oral evidence is introduced with reference to the practice under it, and but one inference can be drawn from the evidence, the question whether an employer and independent contractor relationship exists is for the court.” (57 C.J.S. 416, 417.)

Thus in the case of *De Board v. Procter & Gamble Distributing Co.*, 58 F. Sup. 157, Affirmed 146 F. (2d) 54, where the defendant contracted with a transit company to move defendant’s truck from Georgia to Ohio, even though there was no written contract as in the subject case, a directed verdict for the defendant was sustained since the driver of the truck was selected, instructed and paid by the transit company. The Fifth Circuit Court of Appeals, in rendering its decision, stated:

“The testimony of the witnesses as to who was in charge and control of the truck at the time of the accident, as to how he got control of it, and as to whose employee he was, is without dispute, and no fact or circumstance in evidence in any way impeaches that testimony. The district judge was right then in holding that the evidence showed as matter of law that there was an independent contract and that the injury occurred in the course of its carrying out by the contractor.” (146 F. 2d at 56 and 57.)

Similarly, in the case of *Horan v. Richfield Oil Corporation*, Sup. Ct. of Arizona, 105 P. (2d) 514, 56 Ariz. 64, it was held that the issue involved a question of law rather than one for the jury. In that

case, the plaintiff was hurt at a gasoline station leased by the defendant. The defendant had subleased to one Estes under a written agreement whereby Estes was to operate the station. Dissatisfied with Estes' operation of the station, defendant replaced him with one Combs, who had "taken over" at the time of the injury, although he had entered into no written contract. The court held:

"We are of the opinion that there is no evidence in the record sufficient to go to a jury on the question of whether defendant was in possession of its station through a hired employee and that the only reasonable construction which can be based on the evidence offered is that Combs was in possession as an independent operator in the same general manner as Estes before."

The case of *Harger v. Harger*, 222 S.W. 736, Sup. Ct. of Arkansas, involved a suit against a coal mine owner who had leased the mine under an agreement whereby the lessee was to sell the entire output to the owner at a stipulated price. The court held that as a matter of law, the defendant owner of the coal mine was not the employer of the one operating it and that it was error for the court below to submit the question to the jury. Similarly in the case at bar, it was error of the District Court to submit to the jury the question of whether Lambert was an independent contractor after April 1, 1948.

A case quite similar to the one at bar was that of *Wallace v. Pine Tree Mfg. Co.*, 185 N.W. 500, 150 Minn. 386. The defendant had entered into a contract

with Connors & Wilson to log timber of defendant's and to raft it and ship it to defendant's mill. Connors & Wilson were to be paid \$11.00 per thousand feet upon delivery. The defendant was permitted to have men in Connors & Wilson's camp for the purpose of supervising the defendant's interest in the contract. The plaintiff was involved in shipping logs down the same river used by Connors & Wilson and sued the defendant on the grounds that plaintiff's rights to use the river were interfered with by the transportation of defendant's rafts. The Supreme Court of Minnesota held that Connors & Wilson were independent contractors, stating:

“Construing the contract itself in the light of the surrounding circumstances most favorable to the plaintiff, neither court nor jury is warranted in reaching any other conclusion than that Connors & Wilson, in the driving of defendant's logs, were independent contractors.” (See also *Green v. Soule* (Supreme Court of Calif.) 78 Pac. 337, wherein it was held that the question as to whether a plastering contractor was an independent contractor was for the Court, and that in that case he was an independent contractor even though he was under the supervision of an architect).

The general rule of law is stated in 65 L.R.A. 508 as follows:

“If the contract of employment has been reduced to writing, the question of whether the person employed was an independent contractor or merely a servant is determined by the court.”

Among the numerous other cases upholding this proposition of law are the following:

Ryan v. Associates Inv. Co. of Illinois, 18 N.E.

(2d) 47, 297 Ill. App. 544;

Giroud v. Stryker Transp. Co., 140 A. 305, 104

N.J. Law 424;

Hawk Ice Cream Co. v. Rush, 180 P. (2d) 154,

198 Okla. 544;

World Pub. Co. v. Smith, 161 P. (2d) 861, 195

Okla. 691;

Marion Machine, Foundry & Supply Co. v.

Duncan, 101 P. (2d) 813, 187 Okla. 160;

Blackwell Cheese Co. v. Pedigo, 96 P. (2d)

1043, 186 Okla. 159;

McGrath v. Edward G. Budd Mfg. Co., 36 A.

(2d) 303, 348 Pa. 619;

Bojarski v. M. F. Howlett, Inc., 140 A. 544,

291 Pa. 485;

Taylor v. Haynes, Civ. App., 19 S.W. (2d)

850, reversed on other grounds, 35 S.W. (2d)

104;

Batt v. San Diego Sun Pub. Co., 69 Pac. (2d)

216, 21 Cal. App. (2d) 429;

Thayer v. Kerchlof, 266 P. 225, 83 Colo. 480;

Ruth Bros. v. Stambaugh's Adm'r, 122 S.W.

(2d) 501, 275 Ky. 677;

City of Muskogee v. McMurry, 8 P. (2d) 670,

155 Okla. 203.

In view of the fact that the written contract indicated that Lambert was in complete charge of the operation of producing logs, that he hired and fired

the employees used in the work, that he was paid according to the results obtained, that he paid the expenses of the operation himself, and in view of the uncontradicted testimony that he was in complete control of the details of the operation, as a matter of law, he was an independent contractor after April 1, 1948 while at Barry Arm; and the court erred in leaving the question to the jury.

IV.

THE ALLEGED ORAL CONTRACT OF SALE OF MARCH 24, 1948, WAS NOT ENFORCEABLE AS FALLING WITHIN THE PROVISIONS OF THE STATUTE OF FRAUDS, ACLA 1949, SECTION 29-1-12, SINCE THERE WAS NO SUCH ACCEPTANCE OR RECEIPT AS TO TAKE THE CONTRACT OUT OF THE STATUTE; AND THE COURT'S INSTRUCTION NO. 4 WAS ERRONEOUS IN STATING UNDER THE CIRCUMSTANCES OF THIS CASE THAT "AN ORAL CONTRACT FOR THE SALE OF PERSONAL PROPERTY MAY IN LAW, IF PROVED, BE JUST AS VALID AND ENFORCEABLE AS THOUGH IT WERE WRITTEN".

It was undisputed that the oral contract of sale alleged by the appellees in their amended complaint and in their second amended complaint was for goods of a value in excess of \$500.00. Accordingly, this alleged oral contract came under the provisions of Section 29-1-12, A.C.L.A., 1949, which reads in part as follows:

“Statute of frauds.

(1) (Requirement of writing, etc.) A contract to sell or a sale of any goods or choses in

action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

Despite this undisputed fact, the court in its Instruction No. 4, stated:

"Contracts for sale and purchase of personal property are sometimes put in writing, but not always. An oral contract for the sale of personal property may in law, if proved, be just as valid and enforceable as though it were written."

Where, as in the subject case, the only oral contract involved was for the alleged sale of goods and choses of action in excess of \$500.00 value, the instruction, without mentioning at that point the requirement of acceptance and receipt, was directly contrary to the statute and apt to be extremely misleading to the jury. This fact was pointed out to the court by appellant's exception to this instruction (Tr. 635). The fact that the court in Instruction No. 6 referred to the requirements of the statute, did not cure the possible effects of the erroneous portion of Instruction No. 4, as was expressly pointed out in appellant's exception to this instruction. It would have been a simple matter to have added to Instruction No. 4 a provision covering the requirements of the

statute, so as to prevent that instruction from being in conflict with Instruction No. 6, and so as to prevent the possibility of the jury being misled in that connection; and the court's failure so to amend that instruction was prejudicial to appellant's case.

Moreover, there was no evidence of a receipt and acceptance of part of the goods allegedly sold, so as to take the alleged oral contract outside the provisions of the statute. As mentioned in Section I of this brief (*supra*), Kenneth Lambert had neither express nor implied authority from the appellant company to enter into a contract for the purchase of appellees' property. The honorable court below admitted that there was no such implied authority (Tr. 574, 575). While Lambert had orders to cut timber under appellant's timber contract, he was expressly instructed not to "touch" any of appellees' property. (See Section I, *supra*, and Tr. 375, 533 and 598.)

While "A buyer may accept the goods by an authorized agent, the power of the agent to bind the principal depends on the law of agency". *Williston on Sales*, Rev. Ed. Vol. 1, p. 212.

In the subject case, Lambert had neither express nor implied authority to make such a purchase as the one alleged; and there is no showing at all that anyone else acted on behalf of appellant in receiving or accepting part of the property allegedly sold.

The only actions established which could by any means be regarded as a receipt and acceptance of part of the goods allegedly sold, were those of Lam-

bert in landing a scow in the unoccupied portions of a tideland pond, and in cutting timber under the provisions of the appellant's contract with the United States Forest Service. Neither of these actions could constitute a receipt and acceptance so as to take this case out of the statute of frauds, and for this as well as other reasons, the court below should have granted appellant's motions for directed verdict, nonsuit, judgment notwithstanding the verdict, and new trial.

The law in regard to the requirements for an acceptance and receipt so as to take an oral contract of sale out of the Statute of Frauds has been authoritatively set forth by the Supreme Court of the United States in the case of *Hinchman v. Lincoln*, 124 U.S. 38, at pages 48 to 50, 31 Law. Ed. 337. In that case Lincoln claimed that Hinchman orally agreed to buy stocks from him for \$18,000.00. The stocks were to be delivered to Mr. Van Rensselaer for Hinchman. Defendant appealed from a verdict for the plaintiff. The Supreme Court held that there was sufficient evidence of an oral contract of sale (the facts were much stronger for the plaintiff in that connection than in the case at bar), but as a matter of law there was no such acceptance of the property as to take the case out of the Statute of Frauds.

“In dealing with the question arising on this record we keep in view the general rule that it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to a receipt and acceptance

within the terms of the Statute of Frauds. *Bushel v. Wheeler*, 15 Q.B. 442; *Morton v. Tibbett*, 15 Q.B. 428; *Borrowdale v. Bosworth*, 99 Mass. 381; *Wartman v. Breed*, 117 Mass. 18. But where the facts in relation to a contract of sale alleged to be within the Statute of Frauds are not in dispute, it belongs to the court to determine their legal effect. *Shepherd v. Pressey*, 32 N.H. 56. And so it is for the court to withhold the facts from the jury when they are not such as can in law warrant finding an acceptance, and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence. *Browne*, Stat. Frauds, Sec. 321; *Denny v. Williams*, 5 Allen, 5; *Howard v. Borden*, 13 Allen, 299; *Pinkham v. Mattox*, 53 N.H. 604.

In order to take the contract out of the operation of the statute, it was said by the New York Court of Appeals in *Marsh v. Rouse*, 44 N.Y. 643, that there must be 'acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer as absolute owner, discharged of all lien for the price.' This is adopted in the text of Benjamin on Sales, Sec. 179, Bennett's 4th Am. ed., as the language of the decisions in America. In *Shindler v. Houston*, 1 N.Y. 261, 49 Am. Dec. 316, Gardner, J., adopts the language of the court in *Phillips v. Bistoli*, 2 Barn. & C. 511, 'That to satisfy the statute there must be a delivery by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter

with the intent of taking possession as owner.' And adds: 'This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. *Bailey v. Ogden*, 3 Johns, 421, 3 Am. Dec. 509. * * * In a word, the statute of fraudulent conveyances and contracts pronounces these agreements, when made, void, unless the buyer should 'accept and receive some part of the goods.' The language is unequivocal, and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance.' In the same case *Wright, J.*, said: 'The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. * * * Where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inferences to be drawn from them, and hold the contract to be within the statute. * * * I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract.'

This case is regarded as a leading authority on the subject in the State of New York, and

has been uniformly followed there, and is recognized and supported by the decisions of the highest courts in many other States, as will appear from the note to the case as reported in 49 Am. Dec. 316, where a large number of them are collected. So in *Remick v. Sandford*, 120 Mass. 309, 316, it was said by Devens, J., speaking of the distinction between an acceptance which would satisfy the statute and an acceptance which would show that the goods corresponded with the warranty of the contract, that 'If the buyer accepts the goods as those which he purchased, he may afterwards reject them if they were not what they were warranted to be, but the statute is satisfied. But while such an acceptance satisfies the statute, in order to have that effect it must be by some unequivocal act done on the part of the buyer with intent to take possession of the goods as owner. The sale must be perfected, and this is to be shown, not by proof of a change of possession only, but of such change with such intent. When it is thus definitely established that the relation of vendor and vendee exists, written evidence of the contract is dispensed with, although the buyer, when the sale is with warranty, may still retain his right to reject the goods if they do not correspond with the warranty. That there has been an acceptance of this character, or that the buyer has conducted himself, in regard to the goods, as owner is to be proved by the party setting up the contract.' ' (124 U.S. 38, pp. 48 to 50.)

There was no "unequivocal act" by the appellant or any authorized agent of appellant which could be

construed as such a taking of possession of part of appellees' property as to evidence an intent to become owner thereof, except under the written contract of July, 1948 (appellees did not sue on this contract, and appellee Agostino revoked it). Moreover, appellees did not give up their lien on the property. Thus at the end of June, 1948, the appellee Agostino signed a written contract providing for the transfer of possession of the property to appellant upon the execution of that written agreement (Tr. 34, 199). In July appellees applied in their own names for an extension of the right to cut timber (Tr. 181, 182), although under the alleged oral contract of sale that timber was supposed to have been sold to the appellant the previous March 24th, and as late as May 11, 1949, appellees filed a complaint against the Ellamar Packing Company, claiming ownership in themselves of one of the two caterpillar tractors supposedly sold to the appellant in March, 1948 (Tr. 483, 484).

As this honorable court quoted in its decision in the case of *Kratzer v. Day*, 12 Fed. (2d) 724 at 727,

“Ordinarily the acceptance and receipt must be such a transfer of the property as places the goods beyond the control of the seller and within the control of the buyer.”

There was no such acceptance and receipt on the part of the appellant or any authorized agent of appellant, and it is respectfully submitted that the court should have ruled as a matter of law that the alleged

oral contract was unenforceable under the provisions of Section 29-1-12, A.C.L.A., 1949.

Hinchman v. Lincoln, supra;

Kratzer v. Day, supra;

Richardson v. Smith, 101 Md. 15, 60 A. 612;

Johnson v. Bybee, 16 S.W. (2d) 602 (Mo. Appeals);

Wright v. Schran, 121 Neb. 775, 238 N.W. 658;

Stopfel v. Tearney, 207 N.Y. App. Div. 18, 201 N.Y.S. 621;

Goldbrother Manufacturing Co. v. Hammond Olsen Lumber Co., 184 Wis. 221, 199 N.W. 147.

V.

ON OR ABOUT JUNE 29, 1948, THE PARTIES HERETO ENTERED INTO AN AGREEMENT FOR THE SALE OF THE PROPERTY IN QUESTION. SINCE THIS AGREEMENT WAS REDUCED TO WRITING, SIGNED BY APPELLEES, AND SINCE APPELLANT TOOK POSSESSION OF THE PROPERTY UNDER THE TERMS OF THIS AGREEMENT, THE COURT ERRED IN PERMITTING EVIDENCE TO BE INTRODUCED OF AN ALLEGED PRIOR INCONSISTENT ORAL AGREEMENT INVOLVING THE SAME TRANSACTION.

In June, 1948, the appellee Agostino and Thomas Morgan, president of appellant company, reached an agreement of sale concerning the property which was the subject of this suit (Tr. 462). This agreement was reduced to writing by appellees' attorney, Mr. Butcher and the appellee Agostino signed this written agreement and acknowledged it before a Notary Public. The agreement provided in part:

"It is hereby specifically agreed that all the terms and conditions in connection with this contract have been set forth herein and that there are no other agreements, verbal or written, pertaining to this sale or the method of paying for the same on the part of purchaser." (Tr. 199, 200.)

The agreement provided for an initial payment of \$3300.00 to be made "through Harold J. Butcher, Attorney for the seller", to be deposited with the Clerk of Court and held in escrow pending the outcome of a dispute between appellees and one Ray Grasser concerning the title to part of the property involved in this suit (Tr. 198). Mr. Morgan was in Juneau, when, on about July 5, 1948, he received a letter from Mr. Butcher transmitting this written agreement which had been signed and acknowledged by appellee Agostino. On about July 9th he proceeded to Anchorage and called on Mr. Butcher to complete the contract, and to secure a list of the property to be conveyed (Tr. 383). Mr. Butcher, however, had left the Territory of Alaska to attend a convention and could not be reached at that time. Mr. Morgan proceeded on the assumption that the contract was completed. For the first time he gave instructions to use appellees' property at Barry Arm; he wrote the checks as required under the contract (Tr. 384, 498, 499, 453), and he wrote to Mr. Butcher explaining that the contract was acceptable and that the checks would be paid in accordance with its provisions as soon as a list of the property was fur-

nished (Tr. 385). In reliance on this contract appellant proceeded to repair the two caterpillar tractors which were part of the property conveyed under the agreement (Tr. 389, 543).

Appellant objected to testimony of the alleged prior oral agreement which was in conflict with the provisions of this written agreement. That the written contract signed by Mr. Agostino and acted upon by appellant constituted a binding agreement until revoked by appellees (Tr. 196), is clear. Even assuming that the written contract signed by the appellee Agostino and the letter of July 19, 1948, signed by the president of appellant did not constitute a binding agreement, at the very least the written agreement forwarded to Mr. Morgan constituted an offer to enter into a contract; and the offer was accepted when appellant took possession of appellees' property under the terms thereof.

“With certain exceptions parol or extrinsic evidence is not admissible to vary the terms of a written contract for prior or contemporaneous negotiations are regarded as merged therein.” (32 C.J.S. 816.)

“It is of course necessary to the application of the parol evidence rule to contracts that there shall be a complete written contract between the parties, as appears *infra* Sec. 1013; but it is not necessary that the contract be in any particular form, or that it all be contained in one paper, or signed by both parties; and a writing evidencing the whole of an agreement between the parties which has been delivered, accepted, and

under which business has been transacted, cannot be varied by parol, even though it is not signed; nor does the fact that a contract originally rested in parol and was reduced to writing only after being partly performed preclude the application to the writing of the rule excluding parol evidence to vary or contradict the writing, for the parol agreement is merged in the written one." (32 C.J.S. 823, 824.)

Thus it was held in the case of *Manufacturers and Merchants Inspection Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 138 N.W. 624, that acceptance of a proposed contract contained in a letter, by acting under it for a period of time, is sufficient, without formal signing of it, to exclude parol evidence of its terms.

The Minnesota Supreme Court stated in the case of *Horn v. Hansen*, 56 Minn. 43, 57 N.W. 315, 22 L.R.A. 617 at 619:

"But the written proposal or promise could not be contradicted by parol, though it might be shown that it was or was not accepted, or that the stipulated quantity of wheat was or was not in fact appropriated to the agreement. The general rule is that the omitted portions of contract which does not appear to be complete may be proved by parol, but so much of the contract as is in writing must be proved by the writing." (*Thomas v. Scutt*, 127 N.Y. 138.)

In the case of *Lamson Consolidated Stock Service Company v. Harting*, 19 N.Y.S. 233, 234, and 235, the court states the law to be as follows:

“Purporting to be a conditional sale of chattels, the paper in question specifies the conditions, names the sellers and buyers, identifies the thing sold, states the price, times of payment, and place of delivery. In this enumeration, what element to the completeness of such a contract is wanting? True, the paper is signed only by the defendant, the buyer: but the acceptance of it and delivery of the chattels, pursuant to its provisions, makes plaintiff the seller as essentially a party to it as would be implied by an informal subscription.

* * * * *

“In our judgment, after the paper was signed by one and accepted by the other party, it was quite immaterial from whom it issued in the first instance; and we advert to the fact that it was actually an offer of sale by the plaintiff, only to demonstrate, that by defendants’ own argument, it expressed the engagement as well of seller as of buyer. We affirm these propositions as true beyond doubt of discussion, namely, that where a written offer containing expressly or by implication all the engagements appropriate and necessary to the agreement, is signed by one party and accepted by the other, it constitutes such a complete contract between them that oral evidence is inadmissible to add to its terms * * *”

The case of *Rast et al. v. Bergquist*, 182 Minn. 392, 235 N.W. 372, holds:

“The parol evidence rule applies whenever the parties have formulated and agreed upon a writing as the final repository and conclusive and complete evidence of their intentions.”

In the case of *Beyerstedt v. Winona Mill Company*, 49 Minn. 1, 51 N.W. 619, the court held:

“It is not necessary that the writing be of formal character. ‘Acceptance of a written contract as such is sufficient though it is not signed by the person accepting it’. Williston on Contracts, Section 633; *Lindman v. U.S. Fidelity & Guaranty Company*, 163 Minn. 303, 204 N.W. 159.” See also *Wiley v. California Hosiery Company* (Cal.), 32 Pac. 522; *Commercial State Bank v. Antelope County* (Supreme Ct. of Neb.), 48 Neb. 496, 67 N.W. 465; *Cohen et al. v. Jacoboice* (Supreme Ct. of Mich.), 101 Mich. 409, 59 N.W. 665; *Dunn v. Mayo Mills*, 134 Fed. 804.

Actually the evidence is clear that there was an acceptance of the terms of the written agreement by the letter of July 19, and the other actions taken by appellant. The only matter not made completely clear by the written contract and the acceptance was the listing of the property conveyed.

“In the case of an incomplete writing, or a contract which is partly in writing and partly in parol, the written part cannot be varied by parol evidence in the absence of fraud, accident or mistake; the parts of the agreement proposed to be proved by parol must not be inconsistent with, or repugnant to the intention of the parties as shown by the written instrument.” (32 C.J.S. 1029.)

(See numerous cases cited in note 80.)

By permitting evidence of an alleged prior oral agreement to convey the property in question, the

court permitted evidence to be introduced in direct conflict with the written agreement. This was done over the objection of appellant (Tr. 133, 201, 212), and the inadmissibility of this evidence was further pointed out to the court in appellant's motion for directed verdict, nonsuit, judgment notwithstanding the verdict, and new trial. Without this improperly admitted evidence there was no basis upon which a verdict could possibly be rendered in favor of appellee, and it is respectfully submitted that the judgment heretofore entered in this case should accordingly be reversed.

VI.

THE COURT ERRED IN PERMITTING TESTIMONY OVER APPELLANT'S OBJECTION AS TO THE CONTENTS OF AN ALLEGED TELEGRAM PURPORTING TO GRANT APPELLEES A CONTINUATION OF THEIR TIMBER PERMIT.

When at the conclusion of appellees' case the court permitted them to amend their complaint to a *quantum valebant* theory, from that of an express contract, it became important for appellees to show that they had a timber permit in effect in March, 1948, which authorized them to be present and to cut timber at Barry Arm. Part of their claim that appellant had purchased their property was based on the allegation that Mr. Lambert had cut timber belonging to appellant.

Mr. Jacobson, Supervisor of the Forest Service of the area where Barry Arm is located, was called as a witness and testified that appellees' permit had

expired on December 31, 1947, and was not continued until July, 1948; so that during the period when the alleged sale occurred, appellees had no timber rights (Tr. 311, 327).

It was under these conditions that appellees, through their witness Lambert, offered oral testimony as to the contents of a telegram alleged to have been received by Mr. Agostino from the "Forest Service in Juneau" in March of 1948, purporting to continue appellees' permit to cut timber in the Barry Arm area (Tr. 583-585). Objection was made to the introduction of evidence as to the contents of this alleged telegram on the grounds of hearsay, but the court permitted the witness Lambert to testify as to the contents of the alleged message. The ruling of the court in allowing this testimony was erroneous and substantially prejudiced appellant's case.

As stated in 31 C.J.S. 933:

"Further, a written statement is equally inadmissible under the rule excluding hearsay evidence where the form is * * * as in the case of telegrams."

Bebbington v. California Western States Life Insurance Co., 30 Cal. App. (2d) 157, 180 Pac. (2d) 673;

In re Cassidy's Will, 50 N.Y.S. (2d) 628, 182 Misc. 436, reversed on other grounds, 52 N.Y.S. (2d) 809, 268 App. Div. 633;

James v. Paramount-Famous-Laske Corporation, 138 Cal. App. 585, 33 Pac. (2d) 63;

James R. Kernan Company v. Cook, 162 Md. 137, 159 A. 256;

Gulf C. & S. S. Ry. Co. v. Hill (Texas), 284 S.W. 594;

Continental Trading Company v. Seattle National Bank, 199 Pac. 743, 116 Wash. 479.

The court overruled appellant's objection on the theory that "official communication upon the subject—upon anything concerning the subject of the action I think would be admissible." (Tr. 584.)

The fact that a message contains what may be regarded as an official communication gives rise to no exception to the hearsay rules. The Territory of Alaska has an express statute providing for the introduction of official records.

"Proof of judicial, legislative or executive records. A judicial, legislative, or executive record of said Territory, or of any State or Territory of the United States, or of any foreign country, or of any political subdivision of either, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof, with the seal of the court or the official seal of such person affixed thereto, if it or he have a seal, or otherwise authenticated as required by sections 1738, 1739 and 1942 of 28 USC (1948 Edition)." Section 58-1-3, A.C.L.A., 1949.

Had appellees been granted a continuation of their permit to cut timber, it would have been a simple matter to have secured an official copy of the continuation order from the Forest Service Office in Juneau duly authenticated in accordance with this provision. The

testimony in regard to the telegram is at most a statement by the witness Lambert as to what some individual in the Forest Service said. The person in the Forest Service who allegedly wrote the message purporting to extend the timber permit was not before the court for cross-examination, and the testimony as to the alleged telegraphic message from him was clearly inadmissible.

VII.

THE COURT ERRED IN ALLOWING APPELLEES FURTHER TO AMEND THEIR AMENDED COMPLAINT AFTER APPELLEES HAD RESTED, SINCE THE SECOND AMENDED COMPLAINT WAS BASED ON A SUBSTANTIALLY CHANGED CAUSE OF ACTION.

After appellees had rested their case, appellant moved for a directed verdict or, in the alternative, for a nonsuit (Tr. 271-276). The amended complaint had set forth two causes of action, both based on an alleged oral contract of sale of appellees' property, for the fixed price of \$25,000. This amended complaint made no mention of the reasonable value of the property alleged to have been sold, and the value of such property was not an issue.

The District Court agreed that there was "not sufficient evidence to warrant putting the case to the jury" (Tr. 279, 280) upon either the first or third causes of action (the second cause of action had previously been stricken). The appellees, however, were permitted to amend their complaint, on the theory of

a sale and delivery for a reasonable value. The amended complaint was filed on the succeeding day, and while the trial was still in progress, it was necessary for appellant, much to its prejudice, to prepare an answer, affirmative defense and counterclaim, and to attempt to get the evidence in regard to the reasonable value of the property alleged to be sold, and to attempt to defend on this entirely different basis.

Section 55-5-76, A.C.L.A. 1949, provide as follows:

“Amendments allowed by court before trial or submission. The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause, and in like manner and for like reasons it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, *or when the amendment does not substantially change the cause of action or defense*, by conforming the pleading or proceeding to the facts proved.” (Emphasis ours.)

The only authority of the District Court to amend a complaint is where it does not “substantially change the cause of action or defense”. In changing this cause of action from one on an express oral contract for a fixed price to an implied contract for the reasonable value of the property, a substantial change was made in the cause of action which was beyond the power of the District Court and resulted in material

prejudice to the appellant. As stated in 41 Am. Jur., Section 374:

“Under modern practice as well as at common law, a plaintiff can not sue on one cause of action and recover on another. Any other rule would lead to interminable surprises and consequent injustice.”

The specific type of amendment allowed in the subject case is discussed in 41 Am. Jur., p. 551, wherein it is stated:

“If the plaintiff in his declaration or complaint relies on an express contract, he must prove it as laid, and can not support his case by proof of an implied one, *especially in the absence of an allegation of value.*” (Emphasis ours.)

Had appellees, in their amended complaint on which the case was originally tried, referred to the reasonable value of the property, the appellant might have had reason to be prepared to defend on that basis. As it was, appellant prepared for the trial and undertook the defense of the case as against the allegation of an express contract to sell the property for a fixed price. It was impossible for appellant to make the necessary preparations and to defend the suit on the new cause of action. The rule of law in this situation is further stated in 50 LRAns at p. 16, as follows:

“Nor where he declares upon an express contract, can he recover upon an implied contract on a quantum meruit”. *Sanders v. Hartge* (Ind.), 46 N.E. 604; *Vedder v. Leamon*, 75 N.Y.S. 431; see also *Davis v. Chase* (Ind.), 64 N.E. 88 at 89;

Re Oldfield, 175 Iowa 118; *Wright v. Geer*, 6 Vt. 151, 27 Am. Dec. 538.

Accordingly, it is respectfully submitted that the District Court erred in permitting the amendment of the complaint after appellees had rested, since the amendment resulted in a substantial change in the cause of action and material prejudice to the appellant.

VIII.

THE COURT ERRED IN DENYING APPELLANT'S MOTIONS TO STRIKE PORTIONS OF APPELLEES' SECOND AMENDED COMPLAINT AND MAKE MORE DEFINITE AND CERTAIN, AND TO STRIKE PORTIONS OF APPELLEES' REPLY, SINCE IMPROPER ALLEGATIONS HIGHLY PREJUDICIAL TO APPELLANT WERE PERMITTED TO GO TO THE JURY BY VIRTUE OF THE COURT'S DENYING THESE MOTIONS.

The appellees were permitted to amend their amended complaint after having rested, and to proceed on a new cause of action. The Second Amended Complaint which was filed did not name the person or persons representing the appellant in the alleged sale and the alleged taking of possession of appellees' property. Appellant was entitled to this information.

Subsequently, appellant filed its Answer and Counterclaim to Second Amended Complaint, to which appellees filed a Reply. This Reply contained a great deal of matter which was improperly pleaded and which was highly prejudicial to appellant's case. These portions of the Reply actually constituted written arguments to the jury rather than pleading ulti-

mate facts. *Sovereign Bank of Canada v. Stanley*, 176 Fed. 743; *West Jersey & S. R. Co. v. Cochran*, 266 Fed. 609, 49 C.J. 40-43, note 80.

Thus, in paragraph 1 of plaintiff's reply to defendant's first separate answer, after denying with a few exceptions the allegations contained in that paragraph, appellees entered into a long dissertation stating:

"and further allege the facts to be that said oral agreement was an offer of compromise and was not based upon any consideration, and that the defendant failed, neglected, and refused to go through with said agreement, and that the compromise made on behalf of Bruno Agostino was by reason of having spent two or three months trying to get the defendant to pay him for his property, and that Bruno Agostino had an agreement with the president of the defendant company, Thomas Morgan, that he was leaving Barry Arm Camp, and would return in two days and settle with him, and that Bruno Agostino had waited there at the camp for a period of approximately three weeks, and that Thomas Morgan never returned to pay him for the equipment, and that by reason of the promises made on behalf of the defendant company, the plaintiffs had permitted the defendant to come onto his property, and to take possession thereof, and the defendant had gained exactly what it had wanted, by getting in possession of plaintiff's property, and then by dodging the plaintiffs and failing to meet one of the plaintiffs, Bruno Agostino, and had worn him out by dodging him, and running around over the country until, the plaintiff was desperate fi-

nancially, and that said agreement to settle for \$10,000.00 was entered into by Bruno Agostino, rather than to go to Court, and have to employ counsel and pay court costs and other expenses that he was not able to pay, all of which, amounted to oppression, duress, and fraud on the part of the defendant, which fraud was perpetrated by Thomas Morgan, president of said defendant company.” (Tr. 39-40.)

The pleadings in this case went to the jury at the conclusion of the case and quite obviously such irrelevant, frivolous and sham matters as quoted above, had an adverse effect on appellant’s case.

The extent of the court’s leniency in permitting such obviously improper matters to remain in the pleadings which went to the jury, may be seen when paragraph 14 of appellees’ reply is read. This paragraph replied to paragraph 14 of appellant’s first separate answer and affirmative defense, in which it was alleged that one of the tractors alleged to have been sold to the appellant, was repossessed by its owner, Ellamar Packing Company, on or about October 1, 1948, and that the other tractor and donkey engine were repossessed by Raymond Grasser under a claim of ownership on or about September 25, 1948. The appellees denied having sufficient information “as to the facts alleged in that paragraph to form an opinion as to the truth thereof and therefore deny the said allegations and the whole thereof”. Then, after denying that the tractors and equipment were so taken, appellees went on to plead as follows:

“and allege on information and belief that if the Ellamar Packing Company and the said Ray Grasser did take any of the property sold by the plaintiffs to the defendant, that the same was taken through a scheme and conspiracy brought about by the defendant for the purpose of cheating and defrauding these plaintiffs * * *” (Tr. 43, 44).

Obviously, after denying that the tractors were taken and denying any information and belief in regard to this matter, there was no basis whatsoever for appellees’ alleging that appellant had schemed and conspired to cheat and defraud the appellees by having the equipment taken by third parties. It is hard to imagine material much more prejudicial than these allegations which went to the jury at the conclusion of the case. Appellant by timely motion requested that this portion of the Second Amended Complaint be stricken (Tr. 49). The court, however, overruled this motion.

It is true that the court, after argument had been made to the jury, did give an instruction that this portion of appellees’ complaint should be disregarded, since there was no evidence upon which such an inference could reasonably be made. This, however, did not cure the fact that the pleading containing this highly prejudicial matter was permitted to go to the jury, so that during the jury’s deliberations they had before them this printed offensive and prejudicial matter.

It is accordingly respectfully submitted that the court below erred in denying appellant's motions to strike portions of appellees' second amended complaint and in denying appellant's motion to strike portions of appellees' reply.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the case should be remanded to the court for entry of a judgment in favor of appellant, as prayed for in the original Answer to Amended Complaint and in the Answer to the Second Amended Complaint.

Dated, Juneau, Alaska,
February 24, 1950.

Respectfully,
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